

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DONALD MIDDLEBROOKS)	
)	CAPITAL CASE
Plaintiff,)	
)	No. 3:19-cv-01139
v.)	
)	JUDGE CAMPBELL
LISA HELTON, in her official capacity)	
As Interim Tennessee Commissioner of)	
Correction,)	
)	
TONY MAYS, in his official capacity)	
As Warden of Riverbend Maximum)	
Security Institution,)	
)	
Defendants.)	

**EMERGENCY MOTION FOR PROTECTIVE ORDER
TO PRESERVE EVIDENCE**

Plaintiff Donald Middlebrooks, by counsel, moves this Court for an Emergency Order to Preserve Evidence relating to the last minute reprieve of death row defendant Oscar Smith. In support of the motion, Mr. Middlebrooks states the following:

1. Oscar Smith,¹ a Tennessee death row inmate, was scheduled to be executed on April 21, 2022 at 7:00 PM.

¹ Mr. Smith is also a client of the Federal Public Defender for the Middle District of Tennessee. Asst. CHU Chief, Amy Harwell and Asst. Federal Public Defender Katherine Dis are his counsel.

2. A little over an hour before the execution, and after all appeals had been exhausted and clemency denied, the Governor of the State of Tennessee issued a brief reprieve due to “an oversight in preparation for lethal injection.” Ex. A, Press Release. The Governor went on to say that the reprieve was temporary while “[W]e address Tennessee Department of Correction Protocol.” *Id.* The Governor promised, “Further details will be released when they are available.” *Id.*
3. Given the timing of the announcement coupled with undersigned’s familiarity with the protocol, it would appear that there was an issue with the lethal injection chemicals.
4. Undersigned counsel may seek relief from the Case Management Order with respect to written discovery and may request previously unanticipated deposition(s) in light of these developments. Counsel may also seek leave to amend the complaint outside the deadline for amendments which was April 20, given these events.
5. For now, counsel merely seeks preservation of evidence.² To that end, counsel requests this court to order Defendants and their agents to preserve the following:
 - a. All lethal injection chemicals that were intended for use in the Oscar Smith Execution;

² Undersigned counsel sent an email to Defendants’ counsel requesting preservation of these items within one hour of learning of the complication in the Smith case. Ex. 2.

- b. All packaging of the lethal injection chemicals that were intended for use in the Oscar Smith Execution;
- c. All package inserts of the lethal injection chemicals that were intended for use in the Oscar Smith Execution;
- d. All emails, text messages, Department of Corrections records, reports or memoranda, or any document whatsoever relating to the attempted execution of Oscar Smith on April 21, 2022;
- e. Any photographs, video, or audio recordings relating to the Department of Corrections efforts to execute Oscar Smith on April 21, 2022, including but not limited to any that involve the preparation of the lethal injection chemicals.

6. Undersigned counsel has consulted with opposing counsel. Opposing counsel states:

We do not oppose your request for preservation of evidence listed in your draft motion as modified by the edits below. We do object to paragraphs 3, 4 and the first sentence of paragraph 5 as unnecessary. If you are willing to remove the language to which we object you may say we do not oppose the motion.

7. Undersigned counsel has not deleted the grounds for relief set-forth in paragraphs 3, 4 and the first sentence of paragraph 5, as counsel feels compelled to provide this Court substantive grounds for the relief requested.

WHEREFORE, the motion should be granted.

Respectfully Submitted,

FEDERAL PUBLIC DEFENDER FOR THE
MIDDLE DISTRICT OF TENNESSEE

KELLEY J. HENRY
Supervisory Asst. Federal Public Defender

AMY D. HARWELL
Asst. Chief, Capital Habeas Unit

RICHARD LEWIS TENNENT
KATHERINE DIX
MARSHALL JENSEN
Asst. Federal Public Defenders
810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265

/s/ Kelley J. Henry
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on April 22, 2022, I filed this motion by means of the Official Court Electronic Document Filing System, CM/ECF, for the Middle District of Tennessee, which will email a copy to opposing counsel:

Scott Sutherland, Deputy Attorney General
Rob Mitchell, Asst. Attorney General
Miranda Jones, Asst. Attorney General
Office of the Attorney General and Reporter
Law Enforcement and Special Prosecutions Division
P.O. Box 20207
Nashville, Tennessee 37202-0207.

Additionally, counsel has served a copy of this motion on counsel for Terry King, via email:

Alex Kursman
Lynne Leonard
Anastassia Baldrige
Hayden Nelson-Major

Assistant Federal Defenders
Federal Community Defender for the E.D. Penn.
Suite 545 West, The Curtis
601 Walnut St.
Philadelphia, PA 19106
(215) 928-0520
alex_kursman@fd.org
lynne_leonard@fd.org
ana_baldridge@fd.org
hayden_nelson-major@fd.org

David Esquivel
Sarah Miller
Jeremy Gunn
Michael Tackeff
Bass, Berry & Sims
150 Third Ave. South
Nashville, TN 37201
(615) 742-6200
desquivel@bassberry.com
smiller@bassberry.com
jeremy.gunn@bassberry.com
michael.tackeff@bassberry.com

Alice Haston
Amy Rao Mohan
Christopher C. Sabis
Sherrard Roe Voight & Harbison, PLC
150 Third Ave. South
Suite 1100
Nashville, TN 37201
(615) 742-4539
ahaston@srvhlaw.com
amohan@srvhlaw.com
csabis@srvhlaw.com

/s/ Kelley J. Henry
Counsel for Plaintiff